The BAR ASSOCIATION BULLETIN

Entered as second-class matter, April 13, 1926, at the Postoffice at Los Angeles, California, under the Act of March 3, 1879

Volume 3, Number 11 FEBRUARY 2, 1928 5c a copy: $1 a year

Official Publication of the Los Angeles Bar Association, Los Angeles, Cal.

In This Issue

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

The BAR ASSOCIATION BULLETIN

Vol. 3 FEBRUARY 2, 1928 No. 11

Published the first and third Thursdays of each month by the Los Angeles Bar Association and devoted to the interests of the Association.

Office: 535 Title Insurance Building, Los Angeles
Fifth and Spring Streets
Telephone MEtropolitan 2000, Station 162

LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

VOLUME I, NUMBER 2 JANUARY, 1928

SOUTHERN CALIFORNIA LAW REVIEW

PUBLISHED IN NOVEMBER, JANUARY, MARCH, MAY, AND JULY BY THE FACULTY AND STUDENTS OF THE SCHOOL OF LAW OF THE UNIVERSITY OF SOUTHERN CALIFORNIA.

SUBSCRIPTION, $3.00 A YEAR SINGLE COPIES, 75 CENTS

Mail Subscriptions to Southern California Law Review 3660 University Avenue, Los Angeles

The State Bar of California

By Hon. William H. Waste, *Chief Justice, Supreme Court of California.*

A unified State Bar of California is becoming an accomplished fact. The somewhat loosely united federation of local organizations of the members of the profession, functioning as the California Bar Association, has bequeathed a heritage of splendid service, lofty ideals, and hopeful anticipations to the new organization. Its services, for the honor and glory of the legal profession in California, form a magnificent prelude to the further development of the bar of this state.

The "transition from the old to the new" has been accomplished with gratifying unanimity on the part of the members of the profession. Widespread interest was created in the movement for the organization of a self-governing bar through the efforts of the California Bar Association and its various committees. By reason of the publicity given, the members of the profession were well informed, and were so familiar with the plan that comparatively little, in the way of explanation, had to be offered during the preliminary work of organization. The plan is not entirely a new one. The legal profession of England, France, and Canada has, for a long time, been controlled by self-governing bar organizations, with gratifying results. The State Bar Act has behind it the success with which the plan has been carried out in those countries. While some of its provisions may have to be recast to meet conditions and situations arising in the administration of the Act, not sufficiently, or at all, provided for, the Act itself epitomizes the best thought of the legal profession of the country on the subject. The structural features of the plan, the result of painstaking research and labor of the leaders of the California Bar Association, appear at the outset to have been well conceived.

The State Bar of California will be a self-governing institution in every sense of the word. While the administration of its affairs is vested in a board of governors, the powers conferred upon that body must be exercised with due regard to the purposes expressed in the Act, and in such way as not to violate well-recognized rights and privileges which, since time out of mind, have come to be regarded as the landmarks of the legal profession.

There has been some questioning in the minds of the profession as to the part the individual members are to have in the administration of the affairs of the State bar. That attitude was crystallized in the incident occurring at the organization meeting in San Francisco, when a somewhat premature, but very sincere attempt was made to obtain legislation which had for its ultimate purpose the defining of the rights of the members in the organization. It was the contention of those sponsoring the move that, although the Act provides that the State Bar shall be governed by a board of governors, which has the powers and duties in the Act conferred, the members of the bar themselves have many reserved powers as an organization, and that there was retained for them the right of a very active participation in all the functions and government of the bar. That incident was very timely, and not without benefit. The suggestions advanced at that time will, no doubt, receive the very careful attention of the board of governors as it enters upon the discharge of its duties. While plenary powers must, of necessity, be lodged in the board of governors, the active participation of the members of the bar will be one of the most valuable features of the administration of the organization.

The Act accords due recognition to the inherent power and controlling influence of the courts in the matter of the practice of the law. That is as it should be, for, in the last analysis, the courts, in this as in all other activities of life, are the final conservators of the rights and privileges of each of us.

Some question has arisen, also, as to the relation of local bar associations to the State Bar. Therein lies one of the greatest opportunities the board of governors will have for effective administration. The Act provides for the creation of local administrative committees, which shall be composed of active members of the State Bar,

which provision can be very readily translated to mean the utilization of the local organizations as they are now, or as they will continue to exist, but with this important difference: The local associations will hereafter function with the support and assistance of the more powerful central organization. The Act commits to these local administrative committees the power to receive and investigate complaints as to the conduct of members of the profession, and to make findings and recommendations to the board of governors for action. The governors may also call upon these committees to perform other duties in furtherance of the execution of the provisions of the Act. It can hardly be thought that any board of governors will ever fail to take advantage of this opportunity to so utilize the members of the profession.

The State Bar, with its broad powers of commanding the services of the members of the bar, and with large financial resources available, can be of material assistance to the legislature in solving many of the perplexing problems which so frequently confront that body, and on which it is compelled to act without adequate knowledge or information. Much can be accomplished through careful research committed to sections or committees of the State Bar organized for that purpose. It needs only the suggestion of the possibilities of such work to demonstrate a useful field of operation. For instance, there has come to the writer the suggestion that it would be a great advantage, not only to the bar but to the public at large, if the State Bar should provide a section or division for the study of legal problems involving public utilities, the section to be charged with the matter of considering possible changes in and amendments to the Public Utilities Act. The American Bar Association has, for many years, carried on work of this kind. Backed by the influence and authority of the State Bar, research work of this nature would be most valuable.

While the manner, terms and conditions of the admission of attorneys to practice, and of their continuing in practice, as well as their powers, duties and privileges, have been regarded as proper subjects of legislative control, the responsibility of maintaining the high ethical standards of the

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Recent Legislation Relating to Labor Laws*

By CHARLES F. LOWY *of the Los Angeles Bar, Attorney for the California State Labor Commission.*

It is not intended by this article to cover all changes in the labor laws passed at the last session of the legislature, but only such as come within the jurisdiction of the Labor Commission.

POLITICAL CODE

SECTION 364 — NEW DEPARTMENT OF INDUSTRIAL RELATIONS. By this amendment the department is reorganized. While the existing laws are continued in force, the duties and powers of the several commissions are transferred to the newly created Department of Industrial Relations. This new department is conducted under the control of a director appointed by the Governor. The director is given authority, subject to the approval of the Governor, to organize the department in such manner as he shall deem necessary properly to segregate and conduct the work of the department, and the department is to be divided into at least five divisions, i.e.:

Industrial Accident and Safety,

Housing and Sanitation,

State Employment Agencies,

Labor Statistics and Law Enforcement, and

Industrial Welfare.

Each commission is in charge of a chief, appointed by the Governor, but the entire responsibility for, and the management of, the new department is vested in the director. The new Department of Industrial Relations succeeds to all the duties, powers and authority heretofore vested in the said several commissions.

CODE OF CIVIL PROCEDURE

SECTION 690 — EXEMPTION OF WAGES FROM EXECUTION. Prior to the amendment of this section the earnings of a judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment were exempt by law. The amendment provides that where the debt was incurred for personal services rendered by an employee or former employee only one-half of such earnings are exempt.

PENAL CODE

SECTION 484 TO 490 — THEFT. The new act brings within its provisions the defrauding of any other person of money, labor or real or personal property. It provides that the value of the property shall be determined by its reasonable and fair market value, and where the value of services is received the contract price shall be the test. If there be no contract price, the reasonable and going wage shall govern. The hiring of additional employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

It divides theft into grand theft and petty theft, and designates as grand theft a theft where the value of the property exceeds $200.00. Grand theft is a felony and petty theft is a misdemeanor.

Larceny, embezzlement or stealing are defined as theft.

SECTION 653c — EIGHT HOURS ON PUBLIC WORKS. To require or permit workmen on public jobs to work more than eight hours during any one day is unlawful, except in cases of extraordinary emergency. The following new provision has been inserted in this section:

> "Provided, however, that within thirty days after any employee is permitted to work over eight hours in one calendar day due to such an extraordinary emergency, the contractor doing the work, or his duly authorized agent, shall file with the officer, board or commission awarding the contract a verified report as to the nature of the said emergency together

*EDITOR'S NOTE: *This is the seventh of a series of articles by representative experts discussing Amendments by the 1927 Legislature to the Codes of California.*

with the name of the said worker and the hours worked by him on the said day, and failure to file the said report within the said time shall be prima facie evidence that no extraordinary emergency existed."

Formerly only the officers of the political subdivision awarding the contract were guilty of violation. By the amendment the contractors and subcontractors, or their agents, who shall violate the provisions of the act are also guilty of misdemeanor.

GENERAL LAWS

EMPLOYMENT AGENCIES — STATUTES 1913, PAGE 515; AMENDED STATUTES 1915, PAGE 929; STATUTES 1923, PAGE 934; STATUTES 1927, CHAPTER 263, 264, 333 AND 334. By the 1927 amendment to this act several additional callings are brought within the definition of the term "employment agency." It now provides that any person, firm, partnership, corporation, service bureau, or organization, or club, or school, or any agent or attorney thereof, that shall by advertisement or otherwise, offer, as one of its main objects and purposes, to procure employment for any person who shall pay for its services, or that collects dues, tuition or membership fees of any sort whatsoever where the main object of the person paying the same is to secure employment, come within the meaning of the act. It exempts non-profit organizations organized for economic adjustment, civic betterment and the giving of vocational guidance and placement to its members in which none of the directors, officers or employees receive any profit other than a nominal salary for services performed for the organization, and in which no fee is charged for employment services other than a membership fee or dues entitling the person paying the same to full participation and benefits of the organization; and in which such membership fees or dues are used solely for maintenance of the organization. It further provides that such organizations charging membership fees, in order to be exempt from the provisions of this act, must file with the commissioner of the Bureau of Labor a copy of their by-laws and constitutions, with a sworn statement setting forth their place of business, the names and addresses of their officers, directors and employees and the salaries they receive, and showing also the various benefits furnished to the members and the membership fees charged or collected.

It defines "motion picture employment agencies" to mean and include places conducted for the purpose of procuring or offering, promising or attempting to provide engagements for or employment in motion pictures, or in connection with the motion picture industry, or of giving information as to where such engagement or employment may be procured or provided.

It prohibits the acceptance of "registration fee," which means any charge made, or attempted to be made, for registering or listing an applicant for employment, or for letter writing, cost of photograph, or film showing applicant, charge for costume, or any other charge of like nature, made, or attempted to be made, without having a bona fide order for the placement of said applicant in a position.

The Commissioner of Labor, who was heretofore authorized to revoke any license, has now the power to suspend the same where the law has been violated. The amended act further provides that any violation thereof shall constitute a misdemeanor.

PAYMENT OF WAGES — STATUES 1919, PAGE 294; AMENDED STATUTES 1925, PAGE 174; STATUTES 1927, CHAPTER 217. The provision requiring semi-monthly payment of wages has been amended to the effect that a forfeiture of ten dollars ($10.00) per day for each violation is provided. It authorizes the Commissioner of Labor and his attorneys to bring such actions for, and to accept and receive the penalties, with or without suit.

MANUFACTURE AND SALE OF UPHOLSTERED FURNITURE — STATUTES 1927, CHAPTER 405. The law requiring labeling of second-hand furniture has been amended to include the making, selling, offering or exposing for sale, etc., new upholstered furniture, and the enforcement of this act was placed with the Department of Agriculture.

MISREPRESENTATIONS OF CONDITIONS OF EMPLOYMENT—STATUTES 1903, PAGE 269; AMENDED STATUTES 1915, PAGE 52; STATUTES 1923, PAGE 514; STATUTES 1927, CHAPTER 268. The new amendment adds to the criminal penalty provided in the previous act double damages, resulting from misrepresentations, to be recovered in a

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Technique of the Trial Lawyer*

By NORBERT SAVAY *of the Los Angeles Bar*

The first principle entering into the technique of the trial lawyer is *Deportment.*

It consists of the manner of the advocate and his methods before the court and the jury. It includes the voice, dress, attitude and demeanor—it is personality in action.

An inexperienced trial lawyer sometimes does not even surmise the existence of such a thing as an impression which he himself creates upon the court and the jury during the trial of the case.

The very first impressions on the minds of the jury are created by the counsel in the case. At the very start jurors scrutinize every move of each attorney and form intuitive opinions which, as the trial progresses, become rooted in their minds. Unquestionably it is of the utmost importance to establish a favorable contact with the jury from the very beginning.

Now, the jury is composed of human beings of the average intelligence, sensibility and fairness. If one of the attorneys shows lack of common sympathies, or is offensive, or unfair to the witness or to his opponent or is too technical for the ordinary understanding, the jury will take an instant dislike to him which can not fail to militate against him in their final deliberations.

The late John B. Stanchfield, probably the most successful trial lawyer of this generation, would never interpose an objection to the questions of his opponent unless he felt absolutely certain that they were vital to his case, or constituted a perfectly good ground of appeal if ruled against.

He told the writer: "More cases are lost on account of lawyers' behavior during the trial than due to the lack of evidence."

Even some experienced trial lawyers delight in showing off their knowledge of the law of evidence by objecting to every question they deem irrelevant, immaterial, etc. Unfortunately the court does not always agree with them; and sometimes it keeps over-ruling their objections, which act in the eyes of the jury can make the objector appear ridiculous. And nothing kills a man so quickly in the eyes of his fellow men as a well-directed ridicule.

Tom O'Neill once made his assistant take off the spats which the assistant happened to be wearing (although spats were then the common fashion among gentlemen) because he felt that that part of the attire might be disliked by the jury, composed of plain people, and thus create a prejudice against his client's case.

The second principle in the technique of the trial lawyer is *Method.*

So many lawyers, even men of considerable experience, enter upon a jury case without any definite method of procedure. They have no plan as to how they are going to win their case—whether mainly by the weight of evidence of their own witnesses, or by means of cross-examination, and if cross-examination be their chief reliance, by what manner of it.

That brings to the writer's mind a negligence case in which he was recently counsel for plaintiff. The plaintiff claimed that while she was in the act of alighting from a street car, the car suddenly started to move, in consequence of which she was thrown to the ground and her limb was thereby broken. The defendant claimed that plaintiff stepped off the car before it came to a full stop. The plaintiff had no eye-witness to the accident except herself, while the defendant produced a witness who testified on direct examination entirely in favor of the defendant; namely, that he saw the plaintiff getting off the car while the car was in motion and before it came to a full stop.

When the counsel for the plaintiff entered upon cross-examination of this witness he had some hesitancy as to what method he should adopt, for he had anticipated no eye-witness to the accident other than plaintiff herself. Therefore he started off carefully feeling his way. After a few preliminary questions he discovered that the witness was not at all unfriendly. He was a newsboy about sixteen years old, and he seemed rather anxious to tell details which the counsel for the other side had entirely omitted questioning him concerning. So the writer began asking questions as to what

* EDITOR'S NOTE: *This is the second of two articles by Mr. Savay.*

the boy was doing the day he saw the accident, how he happened to be in the particular spot, how he happened to see the accident, and so on. By the time the witness in his testimony had arrived at the particular hour and place of the accident, he was quite friendly to the examiner, evidently having expected rough treatment which had not materialized. The counsel for the plaintiff then asked these questions:

Q. "When did you first see Plaintiff that day?"
A. "Standing at the door of the car."
Q. "Did you see the car stop?"
A. "Yes, sir."
Q. "What did the plaintiff do after the car stopped?"
A. "Started to get off."
Q. "Was the car then standing still?"
A. "Yes, sir."
Q. "Did you see plaintiff getting off the car?"
A. "Yes, sir."
Q. "Did you see her right foot on the ground and her left foot on the running board of the car?"
A. "Yes, sir."
Q. "What happened then?"
A. "Car started off."
Q. "Then what followed?"
A. "She fell down."
Q. "Did the car stop after that?"
A. "Yes, it stopped again just a moment at the intersection and then went on."

This was the whole story of how the accident happened. The counsel for the defense had not asked the witness whether the car stopped twice at the same corner or whether it was standing still when the plaintiff started to get off. His examination had been as follows:

Q. "Did you see the car start?"
A. "Yes, sir."
Q. "Where was the plaintiff then?"
A. "Getting off the car."

This testimony, as seen, was not a full statement of the facts.

The method of cross-examination employed in the above illustration is sometimes called "Smiling Method of Cross-Examination." Some of the best cross-examiners invariably follow this method first.

The most important part in the technique of the trial lawyer is *Strategy*. It is in fact the very kernel of the general plan and theory of the case; hence it is rather difficult to draw a dividing line between strategy and other methods used in the conduct of the case, tactics, for instance.

In war, strategy is a permanent science whose principles are immutable, while tactics vary with the variation of weapons and modes of warfare. In legal combat no science of strategy has been established, no books have been written thereon. Nothing of the sort is taught in any law school. Yet every experienced trial lawyer knows that there is such a thing and that each attorney has to work it out for himself.

The average practitioner conducts his case according to the accepted methods, beginning with pleadings which he patterns upon the well known formulas. Much evil results from this stereotyped procedure; for instance, the over-crowded court calendars are in a large measure due to unnecessary work thrown upon judges by inexperienced lawyers. There is a regular flood of demurrers, motions to strike and what not, which should have never been made. Some of these, of course, are purely exploitations, or made for the purpose of gaining time, etc. Comparatively few of these are entitled to be termed as strategic moves.

Legal strategy begins with the draft of a complaint, or with the initial pleading of any sort, and ends with the case.

Lack of space does not permit the writer to go into the details tending to elucidate the subject, or explain the fundamental reasons for the conclusions which follow. The rules of conduct here given have been formulated by a no lesser master than Experience, and have also been acknowledged by many successful trial lawyers, interviewed by the writer, as being the principles to which always they faithfully adhere.

1. When several categories of pleading are available, choose the one which allows wider range of proof.
2. In negotiating a settlement strive to have your opponent be the first one who mentions the amount of settlement. This is especially important if you are on defendant's side of the case.
3. In selection of the jury do not accept as absolute truth the statements made by the veniremen regarding themselves. (Inexperienced trial lawyers place, often to their sorrow, too much faith in the answers of the prospective jurymen and jurywomen and neglect to use their intuition and judgment.)
4. In the opening statement of your case do not promise more proof than you can On the subject of strategy and tactics your evidence according to the standard of veracity you yourself establish.
5. Prepare your case with as much care as if your life depended upon the issue of the trial.
6. Anticipate your opponent's proofs by most painstaking research and investigation, for in most cases this quality of evidence wins the case.
7. Decide upon a method of cross-examination as soon as you are in full possession of all the facts in the case, because that will give you time to strengthen your cross-examination and fortify you with additional proofs.
8. Do not scatter your ammunition.
9. Do not make your proofs too voluminous.
10. It is better to establish one big point than a dozen little ones—but it is fatal to lose that big point in the mass of small ones.
11. The motto of the trial lawyer should be, "Concentrate, concentrate, always concentrate." In other words — hit the bull's eye.
12. In summing up, use only your strongest points and concentrate all your arguments on them. Let the details "go to blazes."

The importance of preparation is illustrated by the case of People vs. Gardner, where the defendant was charged by a state senator with bribery. The evidence all pointed to the truth of the charge, and the defendant had no way of disproving it, as there were no witnesses to the conversation between himself and the senator who was the chief prosecuting witness.

Max D. Steuer, who was attorney for the defendant, caused a thorough investigation of the record of the prosecuting witness and found in the record some extremely compromising things concerning the witness. He therefore concentrated all his efforts to show the jury the worthlessness of the man, and without submitting any other proof won his case by annihilating the witness.

No mistake is more frequently made than that which occurs when the cross-examiner, after having made a telling point, instead of stopping then and there or changing the direction, proceeds to ask some foolish question with the result that the witness with one answer destroys all the previous advantage the examiner had gained.

On the subject of strategy and tactics the writer has had many conversations with

famous lawyers. Frank Hogan, who as attorney for Doheny in the celebrated government fraud case, secured the acquital of his client, told the writer one day: "The trouble with most lawyers is that they undertake cross-examination without any preparation of evidence on which they can rely. They seem to depend wholly on inspiration for impeaching the witness. Personally I have found there is in the successful conduct of every case more of perspiration than inspiration."

Clarence Darrow, the famous criminal lawyer, is a great philosopher as well. The writer has had several interesting conversations with him on a variety of subjects. In discussing the general trend of the average lawyer's mind he said: "One of the things that goes to make a successful advocate is what I call broad-mindedness. The average lawyer is too dogmatic, too orthodox. He is afraid to leave the beaten track of precedent and therefore is incapable of originality. He sticks too much to the form. One can not become a great advocate unless he cultivates and develops considerable originality."

In regard to *Tactics*—this depends for the most part upon the emergency of the moment, and yet anticipation here as in other lines of the general plan is advisable.

One very noted lawyer in the East won a great many verdicts by rather unique tactics. Whenever he saw things going against him and sensed an adverse verdict, he would stage a violent quarrel with the court. The judge oftentimes would become incensed, lose his head, and manifest great unfairness toward the counsel throughout the balance of the trial, which conduct would serve to secure the sympathy of the jury for the mistreated attorney, with the result of either a verdict for the counsel's client or a disagreement.

In conclusion the writer desires to suggest that those of the colleagues at the bar who anticipate much trial work may find it interesting and helpful to read such books as, *Life Sketches of Eminent Lawyers*, by G. J. Clark; *Extraordinary Cases*, by H. L. Clinton; *Modern Jury Trials*, by Donovan; and *Reminiscences of Rufus Choate*, by Parker. These the writer found to be instructive as well as entertaining.

The President's Page

Fellow Members,
Los Angeles Bar Association:

AGAIN CONCERNING THE HICKMAN CASE

Two of the daily papers recently contained a story to the effect that officials of the Bar Association had advised concerning the assignment of this case to a certain judge. The fact is that the officers of the Bar Association made no recommendation in the matter, were not authorized by the Board of Trustees to make any such recommendation, and would in no case make any such recommendation except upon invitation of all the judges of the Superior Court or of the Presiding Judge. I think it only fair to Judge Hardy and to Mr. Morrow, Mr. Slosson and myself to say that Judge Hardy has assured us that no such information was given to the newspapers by him.

It is proper also to say in this connection that Mr. Morrow, Mr. Slosson and myself were asked to discuss with the judge in charge of the master calendar in the criminal division and also with the Presiding Judge the requests of newspapers and other news agencies for special accommodations at the Hickman trial.

It is very gratifying to report the attitude of the judges with respect to the problem of publicity. The judges were in accord with the viewpoint of the Bar Association, and with all due respect to the desire of the news agencies to give the public a timely and accurate account of the proceedings in the Hickman case it was agreed that no special provision should be made for the press which would in any wise detract from the dignity of the proceedings. As I understand it, the requests by the news agencies for a re-arrangement and elevation of seats, the installation of private wires and silent tickers, the use of noiseless typewriters and the taking of photographs in the courtroom were denied; also only a reasonable number of seats were reserved for the press, and as adequate provision as possible was made for the general public. These limitations are a distinct advance over arrangements which characterized certain sensational trials in Los Angeles County heretofore, and the judges are entitled to due credit for their stand in this matter.

The point of view of the newspaper is honest and sincere. The news agencies feel that it is their duty to report all news events quickly and accurately and in a way that will stimulate thought and satisfy the natural curiosity of their readers. They honestly feel that the day is coming when through modern invention any member of the public can get a view inside of any public place and can visualize any public proceeding occurring anywhere in the country, whether he be at that place or elsewhere. It is argued that any member of the public is just as much entitled to know the details of a public proceeding as are the few who are fortunate enough to gain admittance to the small enclosure where the public proceeding is being conducted. They argue that public good must always come from public knowledge. If there are defects in our present system they can only be corrected by a public understanding of them which will come about by a public expose of them through news agencies.

The press understands the point of view of judges and lawyers and we understand theirs. There is in this community at least, a very sincere feeling of sympathy between the bench and bar and the press with regard to the respective aspirations of each. The press desires as much liberty as can be obtained by persuasion and argument, but at all times is quite willing to bow to the judgment of the court with respect to the bounds of such liberties. It is the unanimous feeling of the bench and bar that sensational trials should not be dramatized, that every defendant should be given as nearly as possible the same kind of hearing. "Sob sisters," sketch artists and those straining to play up the spectacular do not, in the opinion of the bench and bar, conduce to the trial of an issue fair either to the defendant or to the state.

One interested solely in the administration of justice finds it difficult to see the value of any contribution that can be made to the common good by a moving picture director, a sensational preacher or a "sob sister" in proceedings of this nature. When one of the latter likened the defendant to the thief who was crucified upon the cross with our Savior, and to a hunted deer about to be devoured by wolves, I shuddered at the effect such pictures must have upon the public mind. It is to protect our

age-old institutions that the bench and the bar are fighting to confine drama to the theaters and exclude it from the courtroom. If the judge, the jury, the prosecutor, the counsel for defendant and the defendant himself have one ear tuned to the telegraph, the radio and the boom of the flashlight, and their minds occupied with possible headlines, photographs and sensational mentionings in the daily press, can justice be done? It cannot. Surely not to the defendant. Just as surely not to the state or to the public welfare. The balance of true justice is delicately poised.

HARMONY

Harmonious relations between the organizations representing two of the three great professions are not to be jeopardized by the expression of individual views. I am informed that the committee of the Ministerial Association will report favorably upon the response of the Trustees of the Bar Association to its inquiries concerning statements by our secretary made in a private conversation. The following letter was forwarded to the Ministerial Association:

January, 19, 1928

Ministerial Association of
Los Angeles and vicinity,
Los Angeles, California.

Gentlemen:

There has been presented to Los Angeles Bar Association a copy of the resolution passed at a recent meeting of your association.

In response to your communication we desire to advise you as follows:

Any statement that may have been made by Mr. Variel as to the conduct of members of the bar was merely the expression in private conversation of his own personal opinion, and any such statement did not and does not have the sanction of Los Angeles Bar Association and we do not agree with or approve of it.

As to the second statement referring to an alleged occurrence in another county five or six years ago, this board has no knowledge of any such occurrence. Mr. Variel states that no reference was made by him to Los Angeles County, as indicated by your informant, and that he did not refer to any judge who is on the bench in Los Angeles County or on the Federal bench in this district.

We do not hesitate to assure you that the Los Angeles Bar Association has always stood, and now stands for the firm enforcement of all laws upon the statute books. This declaration includes, of course, the Eighteenth Amendment and the Volstead Act.

Los Angeles Bar Association and the Ministerial Association of Los Angeles and vicinity are working for a common purpose, and we believe that great good can be accomplished by mutual confidence and amity.

We therefore beg leave to subscribe ourselves,

Most respectfully yours,

TRUSTEES LOS ANGELES
BAR ASSOCIATION,
By KEMPER CAMPBELL,
President.

Several of the most prominent ministers of the city joined in a communication upon the same subject. Believing that the members of the Bar Association will appreciate this expression of confidence by men of such standing and influence in their profession, I quote their letter in full:

The Ministerial Association of
Los Angeles,
Los Angeles, California.
Dear Brethern:

We note public reference to a resolution passed by our association at its November meeting demanding certain "statements" from Los Angeles Bar Association.

We are credibly informed that the Bar Association, through its Board of Trustees, long before the Ministerial Association passed the resolution in question, agreed not to permit any one — even guests — to have or serve liquor at any of its social events. It has thus set an example which deserves the commendation of the Ministerial Association.

The alleged statement of Mr. Variel upon which the inquiry contained in the resolution of the Ministerial Association was based was merely the expression of a private opinion of an individual and was given privately as such. Mr. Variel states that the incident as to the judges to which he referred occurred in another county five or six years ago, and did not involve any judge now on the bench in Los Angeles County or any Federal judge of this district.

We have been assured by lawyers and judges of unquestioned integrity that the judges of Los Angeles County are law-abiding citizens whose prohibition records are above reproach.

Public attacks against the president and members of the Bar Association growing out of a casual and private conversation of Mr. Variel, are, in our opinion, wholly unfounded and unjustified.

It is our sincere hope that the Ministerial Association will not injure the cause to which we are all devoted by reflecting upon the integrity and standing of those leaders who are conscientiously striving to uphold law and order in this community.

We are confident that with these facts before us, we will not allow any hasty and ill-considered individual expressions to disturb that spirit of mutual confidence and co-operation which has heretofore obtained between these two great professions that have long been dedicated to the cause of justice and righteousness.

Yours very cordially,
EDWIN P. RYLAND
SAMUEL J. MATHIESON
JOHN ALBERT EBY
HUGH K. WALKER
JAMES A. FRANCIS
L. T. GUILD

KEMPER CAMPBELL

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

The Rule Making Power

ADVANTAGES IN PROPOSED PLAN FOR REGULATING PROCEDURE BY RULE OF COURT

By HON. LEON R. YANKWICH, *Judge of the Superior Court, County of Los Angeles.*

Too many proposals for the modification of our procedural scheme arise either from a desire to take care of some particular situation which cannot be dealt with under existing law, or from a desire of well-meaning persons to make pleading easier through further simplification.

It is difficult to make a law so general as to cover all possible contingencies. Of necessity, law in general, and our law of procedure in particular, is and should remain general. If it be subject to imperfections, they are the imperfections of all things human. After all, courts are places where justice is administered, not in the abstract but judicially, i.e., humanly—subject to human deficiencies.

Our general scheme of procedure is simple. While further simplification may be possible, we shall never make pleadings so easy as to dispense with the necessity of a knowledge of substantive law and the elements which go to constitute the cause of action or ground of defense before attempting to construct a pleading. We cannot abolish by legislative fiat the inherent distinctions between actions which are grounded upon different theories of liability. A procedural scheme, however, should have elasticity and adaptability to new conditions. Society is becoming more and more complex, and legal procedure should keep step with such development and be able to adapt itself to new conditions as they arise. The proposal to regulate procedure by rule of court will enable us to avoid easily and quickly glaring injustices which may arise under the general rules. It will also enable us to achieve a judicious simplification where necessary. Above all, it will enable us to adapt procedure to the rapid changes of life about us.

I might rest my support of the resolution sponsored by the Committee on Civil Procedure of the Bar Association on these fundamental grounds. But to anticipate any possible objections on the part of those who believe this would necessarily give legislative power to courts, I may state that after all, the people through legislative power have little interest in our procedural scheme. There are, of course, many things procedural which more or less involve matters of governmental policy; but even as to those, the manner of giving effect to them is of no moment to the people at large and can be safely left to the judiciary. To illustrate: The statute of limitations is a matter of governmental policy. In California and all western states, for historical reasons, short statutory periods of limitations are the rule. The legislative body should retain the power to determine the various periods of limitation; but the manner in which the question of limitation shall be raised in the trial of an action, whether by demurrer or answer, can be safely left to the determination of proper rules. The policy of the law will in no way be affected by allowing the courts to decide in what manner the question shall be raised. The determination of the grounds of divorce is a question of governmental policy, but it is not necessary, in order to carry that policy into effect, that a legislature should tell us what, even for statistical purposes, a complaint for divorce should contain or on whom it should be served.

In what cases the auxiliary remedy of attachment shall be available, and against whom, is a question of legislative policy. But the steps to be taken by a litigant before obtaining a writ, the manner of levying under the writ, and all steps leading to the sale of the attached property following judgment, can be safely left to the courts, subject to constitutional limitations against infringement of private rights without due process, leaving to the legislature the determination of exemptions from levy.

I might go on indefinitely and follow step by step the various chapters of our Code

of Civil Procedure. Were this done we would find that a small portion only of the matters with which they deal involve questions of governmental policy. The instances given suffice to illustrate the point that in addition to the general principles which should prompt us to abandon the present scheme and adopt a scheme of procedural regulation by rule of court, there is the further fact that the people at large have no interest whatsoever on the ground of policy in most of the accidences of our procedure. These accidences of procedure either do not involve any question of policy or merely serve to give effect to policies. The latter should always be left to the determination of the legislative branch of the government, but no harm could result from leaving the former in the hands of the judiciary.

Dean Edson R. Sutherland, in his address before the American Bar Association in 1926, called attention to the fact that except for the abolition (by the Field Code) of the forms of action and of the distinction between actions in law and suits in equity, not a single important new feature of American origin has been added to our procedure, in the three quarters of a century of legislative tinkering.

In the same address, he said:

"Rules of procedure laid down by legislative mandate do not grow spontaneously out of the exact requirements of actual practice, and they fail to show that delicate adaptability to circumstances which distinguishes a professional technique. They embody legislative theory, not judicial experience, and often tend to destroy by their clumsy abstractness the very purposes which they are created to serve. The subtle appreciation of the conditions of litigation, which can only come to those who spend their lives in the active administration of justice, is not possible among the members of a popular assembly who meet to make the laws." (*Reports of American Bar Association*, vol. LI, p. 281.)

To those who look upon the proposal as an innovation we answer in the words of Dean Roscoe Pound:

"The common law courts had regularly exercised a power of regulation of judicial procedure by rule of court down to the Revolution. It was not until the New York Code of Civil Procedure in 1848 that legislative regulation of every detail became the fashion. When Tidd's Practice was published (1794) setting forth the procedure in England which obtained at the time of the Revolution, practice was governed by 'general rules and orders' made by the judges. The oldest of these rules in force in the King's Bench went back to 1604. In other words, we inherited a system of regulating procedure by rules of court, and practice at law in the United States is founded upon the rules of the courts at Westminster as adopted and modified by our courts prior to the taking over of the subject so largely by American legislatures." (*Journal, American Bar Association*, February, 1927.)

In reality, therefore, by this proposal we would not be giving to the courts a new power, but would be giving back to them a power which was theirs long ago.

We would not be innovating, but would be going "back to the fathers."

We would become not *innovators* but *restorers*.

CRITICISM OF PROPOSED PLAN FOR REGULATING PROCEDURE

By A. H. SWALLOW *of the Los Angeles Bar*

Procedural reform, no doubt, is a very live question in such jurisdictions as still retain the technical common law forms for the distinction between legal and equitable actions. But in this state where the system of pleading and practice is almost a model of simplicity and directness, where is there any justification for this agitation? It is practically conceded that there is no crying evil here to be corrected, and no emergency confronts us. The only serious difficulty we have had here is getting a case to trial after it is at issue.

It very seldom occurs that there is unreasonable delay in settling the pleadings.

The chief argument advanced in favor of this proposal is that it will provide greater facilities for changes in the practice in case we want them. That is the strongest argument against it. Facility of change means frequency of change, and is the enemy of stability of government. Changes

are bound to result in more or less confusion. Frequent changes would result in a lawyer spending more time in studying the rules of court and determining their proper meaning and interpretation, than he would in the merits of the controversy he was engaged in.

Mandatory rules of the court, of course, have the force of law, and one of the just complaints of the public now is that there is too much law.

In the limited field now permitted to them, our local courts change their rules so often that the *Daily Journal* has recently announced that it will no longer print them in booklet form, but will simply run them off on newspaper sheets. It stalls the imagination when one tries to conceive what the results would be if the courts were permitted to roam at will over the whole field of pleading and practice.

If there were any real or substantial objections to our present system, if by reason of it justice were frequently denied, or unfairly administered, even the most conservative of us would join in the demand for a change. But in the absence of any such condition, I feel that the words of Chief Justice Taft are peculiarly appropriate:

> "It is a fundamental error to seek quick action in making needed changes of policy. Nations live a long time, and a year or five years is a short period in their life. Most wrongs can be endured for a time without catastrophe. Reforms that are abiding are achieved step by step. It is better to endure wrongs than to effect disastrous changes in which the proposed remedy may be worse than the evil."

Golf Tournament

NOTICE TO MEMBERS OF LOS ANGELES BAR ASS'N.:

The first golf tournament of Los Angeles Bar Association will be held February 13, 1928 (Lincoln's birthday) at the Lakeside Golf Club, near the First National Studios in North Hollywood. Entrants in the tournament will start teeing off at 12 o'clock. Luncheon will be served at the club.

Any member of the association wishing to enter the golf event who has not done so should immediately notify the Bar Association Golf Committee, attention E. E. Noon, chairman, 830 Merchants National Bank Bldg., stating club, handicap, name, address and telephone. A form on which can be written the information desired is to be found on page 14 of the last issue of THEBULLETIN.

BAR ASSOCIATION GOLF COMMITTEE,
By E. E. NOON, *Chairman.*

Opinions by Committee on Legal Ethics

W. Joseph Ford, *Chairman*

Gurney E. Newlin
John O'Melveny

Theodore T. Hull
John Biby

47. Lien for Fees

Inquiry has been submitted as to whether an attorney is entitled to a lien upon his client's papers for services rendered.

This question although in one sense a question of legal ethics is primarily one of law. If under the law of this state an attorney has a lien on the papers of his client for services rendered, it would be strange indeed if the ethics of the profession should prevent the exercise of such a lien. If, on the other hand, an attorney has no lien upon the papers of his client for services rendered, under the law of this state, it would be academic to discuss the ethics of the matter.

A careful examination of the decisions of the courts of last resort of this state fails to reveal any case wherein this point has been passed upon. California Jurisprudence says:

> "The paucity of the California cases on attorney's liens, and particularly the entire absence of authority on retaining liens, is remarkable." (3 Cal. Jur. 683.)

It is true that the courts of last resort of this state have mentioned attorney's liens in six different cases, but, as will be shown later, in none of these cases did the court decide the question under discussion here.

The statutory law of this state is equally silent on attorney's liens.

The Civil Code defines liens in general and provides for their creation, effect, priority, redemption and extinction. (Div. 3, Part 4, Title XIV.)

Section 2881 of the Civil Code states that a lien is created by contract of the parties or by operation of law. Sections 2873 to 2875 of the Civil Code classify liens as general and special and define the two classes. Other sections of the Civil Code provide for liens for "Factors," "Bankers," "Shipmasters," "Seamen," "Officers," "Mechanics and Materialmen," "Ships," "Workmen on Threshing Machines," "Stallion Keepers," and "Log-Cutters," but there is no mention in any part of the Codes of an "attorney's lien."

Section 3051 of the Civil Code provides:

> "Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, safekeeping, or carriage thereof, has a special lien thereon, dependent upon possession, for the compensation, if any, which is due to him from the owner for such service; a person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and material furnished, and may retain possession of the same until the charges are paid * * *"

This section of the Code might possibly be construed to give an attorney a lien upon papers he had drawn for his services in drawing the same. It would go no further, however.

Section 1021, of the Code of Civil Procedure provides, however:

> "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

It is our opinion that the above section, properly construed, is conclusive as to the measure and mode of compensation of attorneys in this state.

Under the common law, attorney's liens were of two kinds: (1) a general or retaining or possessory lien which attached to all papers, documents and money that came into the hands of the attorney professionally as an attorney, under which he was entitled to retain possession of such papers, documents, and money until the general balance due him for professional services was paid; (2) a special or particular or charging lien, which was the right of an attorney to recover his fees and money expended by him on behalf of his client from a fund recovered by his efforts. This lien included the right as an incident thereto to have the court interfere to prevent payment by the judgment debtor to the creditor

client, in fraud of the attorney's lien, and also the right of the attorney to set aside assignments and settlements made in fraud of his right. (6 C.J. 765-6; 2 A. L. R. 1065; Weed Sewing Machine Company v. Boutelle, 56 Vt. 571, 48 Am. Rep. 821; Prichard v. Fulmer, 22 N. M. 134, 199 Pac. 39, 2 A. L. R. 474) (A good case reviewing the authorities.)

Attorney's liens have been mentioned by the courts of last resort of this state in six different cases. All of these cases, however, involved liens of the second kind — i.e., special or particular or charging liens. The question under discussion here involves an attorney's lien of the first kind—i.e., a general or retaining or possessory lien.

The language of the courts in those cases wherein attorney's liens of the second kind are mentioned, although not directly deciding that an attorney has no retaining lien under the laws of this state, are nevertheless instructive as indicating the opinions of the various courts as to the existence of any attorney's lien of any kind in California.

The first case mentioning attorney's liens appearing in the California reports is the case of Ex Parte Kyle, 1 Cal. 332, decided in 1850. In that case one Chipman, plaintiff, recovered a judgment of $7,000.00. Defendant appealed but prior to argument of the appeal, the case was settled. The attorney for Chipman moved the court that Chipman be required to pay him $2,000.00 out of the judgment recovered, for his services. The court cited Graham's Practice, 61, and said:

> "It thus appears that an attorney has a lien for his costs upon a judgment recovered by him, which may be enforced upon giving notice to the adverse party not to pay the judgment until the amount of the costs be paid, and, in some cases, when there has been collusion between the parties to cheat the attorney, the Court has required the client to satisfy them. But this practice is confined to some fixed and certain amount allowed by statute, and is not extended to cases where an attorney or counselor claims a quantum meruit compensation for his services. In this State we have no statute giving costs to attorneys, and they must recover for their services in the ordinary mode. * * *.
>
> "Motion denied."

It will be noted that the case before the court involved a "charging lien" rather than a "retaining lien." The last line although dicta, is instructive, however, as indicating that the court did not regard the exercise of an attorney's lien as an "ordinary mode" of recovering compensation for services.

The case next coming before the court in which an attorney's lien was involved was Mansfield v. Dorland, 2 Cal. 507, decided in 1852. In that case plaintiffs prior to suit agreed with their attorneys that if the latter brought suit and recovered, they should have one-third of the judgment and all of the costs as their compensation. Plaintiffs after judgment in their favor, compromised with defendants so far as their own interests were concerned but told defendants of the attorney's interest. Plaintiffs thereupon entered satisfaction for themselves. Upon application of the attorney, the court set aside the entry of the satisfaction as to one-third of the judgment and the costs and ordered that execution issue against defendants for the purpose of satisfying the interests of the plaintiff's attorney. Upon appeal, the Supreme Court said:

> "This is an appeal from an order of the Superior Court, setting aside the satisfaction of a judgment. In Ex Parte Kyle, 1 Cal. Rep. 331, this court decided that an attorney has no lien upon a judgment recovered in favor of his client, as a compensation for his services. To this decision we give our approval and where the plaintiff enters satisfaction of a judgment, the attorneys have no right to disturb it.
>
> "In the case presented by this record, there was no assignment of the judgment, and it is therefore unnecessary to consider what would be the effect of an assignment.
>
> "Let the order of the court below be reversed, and the motion there dismissed with costs."

It will be noted that this decision also relates to a "charging lien," and is valuable only in that it directly confirms the decision in Ex Parte Kyle (supra).

The next case found in the reports is Russell v. Conway, 11 Cal. 93, decided in 1858. In that case plaintiff sought in equity to off-set an unsatisfied judgment he had obtained against Conway against a judgment Conway had obtained against him. One Brooks who had as attorney for Conway obtained the judgment against Russell, objected on the ground that the judgment had been assigned to him and also that he had

a lien on the judgment for his costs. The Court said as to this last contention:

"The only remaining question raised by the appellant is as to the lien of the attorney for his costs, which question was settled by this Court in Ex parte Kyle. I Cal. 331, and Mansfield v. Dorland, 2 1b. 507; and we have no desire to disturb those decisions."

This case apparently also involved an attorney's "charging lien" and is valuable only in that it again affirms the decision in Ex parte Kyle (supra).

In Hogan v. Black, 66 Cal. 41, 4 Pac. 943, decided in 1884, plaintiff in foreclosure proceedings of a street assessment lien assigned the cause of action to his attorney. Later defendant without knowledge of the assignment settled the matter with the plaintiff by paying him less than the amount demanded. Plaintiff satisfied the demand and cancelled the assessment. The attorney continued the action. The court said:

"The settlement made by defendants with the nominal plaintiff, without notice, actual or constructive, of any assignment of the cause of action, was therefore valid against the secret assignee * * * and his only remedy, under these circumstances, was against the plaintiff in the action and not against the defendants. Nor did he have an attorney's lien for costs in action by which he could disturb the satisfaction of the demand, and the cancellation of the assessment of the plaintiff. Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway. II Cal. 103."

The language of the court in the above case was necessarily directed at a charging lien but is a direct affirmance of the prior decisions of the court.

The next case found in the reports wherein an attorney's lien is mentioned is Gage v. Atwater, 136 Cal. 170, 68 Pac. 581, decided in 1902.

This case came to the Supreme Court on an appeal by the attorney for the plaintiff from an order of the lower court permitting a substitution of attorneys by the plaintiff. The attorney objected to the substitution on the ground that he had rendered valuable services and also that plaintiff was indebted to him for money advanced to defray the expenses of the suit. The court said:

"The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action does not deprive the client of this right (to substitute attorneys). Section 1021, Code of Civ. Proc. provides that the mode and measure of compensation of attorneys is left to the agreement of the parties, and in the absence of any other agreement in reference thereto, there arises the ordinary money obligation which exists upon the employment of one person in the service of another. It was held at a very early day that there is no statute in this state giving costs to attorneys, and that an attorney has by law no lien for his services upon a judgment recovered in favor of his client, but that he must recover therefor in the ordinary mode by an action. Ex parte Kyle, 1 Cal. 331."

The court then quotes from Mansfield v. Dorland (supra) and cites Russell v. Conway, (supra), and Hogan v. Black, (supra).

This case also involves a "charging lien." The opinion is interesting, however, in that the court indicates what the court in that case believed the court in Ex parte Kyle, (supra) meant by an "ordinary mode" of recovering compensation. It will be noted that the court states in the last line quoted above "but that he must recover therefor in the ordinary mode by *an action.*"

The most recent case appearing in the reports in which an attorney's lien is mentioned is McGowan v. Dalzell, 72 Cal. App. Dec. 197, 236 Pac. 941, decided in 1925. In that case plaintiff employed one Witter, an attorney, to commence and conduct a suit on a promissory note, upon a contingent fee plus costs to be paid out of the judgment recovered. Defendant appealed from judgment against him in the lower court. Plaintiff agreed to pay Witter $250.00 and costs of the appeal out of the judgment recovered in addition to the original amount agreed upon if Witter would argue the case on appeal. After judgment was affirmed, plaintiff agreed with Witter to permit Witter to collect on the judgment, keep the amount due him, and turn over the remainder to plaintiff. Defendants were notified of the arrangement and subsequently paid Witter $100.00 which he applied on the amount due him. Later plaintiff notified Witter that he elected to terminate the relationship of attorney and client but no substitution of record was ever made. Subsequently plaintiff accepted an amount less than the judgment from the defendant in full satisfaction of the judgment. No satis-

faction of record appears to have been made. Subsequently Witter caused execution to issue on the judgment. Defendant moved to recall the execution. The court denied the motion but ordered that execution be enforced only for the difference between the amount paid by the defendant to the plaintiff and the face of the judgment. Witter appealed claiming that the order should have permitted the enforcement of the entire amount of the judgment claimed by him. The court found that there had been a valid assignment of the judgment and that defendant had acknowledged and acquiesed in the assignment. The decision of the court for Witter was based on that ground. That portion of the opinion relating to Witter's claim to an attorney's lien although dictum and although directed at a "charging lien" is interesting, however, as indicating that the cases cited above herein are still being cited by the courts of last resort of this state as authority. The court says:

> "We find no case that holds a contract providing merely for the payment of an agreed contingent fee for legal services in an action for and which results in a money judgment, in the absence of other terms in legal effect constituting a transfer of a part of the claim or judgment, gives a lien upon or interest in the judgment. Mansfield v. Dorland, 2 Cal. 307; Russell v. Conway, 11 Cal. 93; Gage v. Atwater, 136 Cal. 170, 68 Pac. 581."

The above cited cases, although involving "charging liens" rather than "retaining liens" nevertheless indicate and infer that in California attorney's liens are frowned upon by the courts. In no case has it been held or even inferred that any attorney's lien of any kind exists. The cases all indicate that such a lien does not exist. This fact, together with Section 1021 of the Code of Civil Procedure cited supra, justifies the statement, we believe, that in California an attorney has no lien whatsoever for services rendered or for costs.

If we view the matter entirely from the viewpoint of legal ethics, it would seem that an attorney should not have a lien upon the papers of his client for services rendered. The exercise of such a lien would in numerous cases work great hardship upon an indigent client. The exercise of such a lien might in numerous cases work to great injustice to a client who would be compelled to pay an unreasonable fee as a condition precedent to getting papers he was compelled to have immediately. An attorney is adequately protected by this action for his services. Such an action has long been the established method of collecting for services rendered. No additional protection is needed.

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48. REIMBURSEMENT

Inquiry has been submitted as to whether an attorney is entitled to retain moneys in payment of disbursements which he has made when such moneys were received by him in another matter in which he appeared as attorney for the same client, assuming that the client has not agreed to allow the attorney to retain same.

The compensation of any attorney in California is governed by Section 1021 of the Code of Civil Procedure, providing:

> "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

It is the opinion of the Committee as heretofore expressed that the above section is conclusive as to the measure and mode of compensation of attorneys and that an attorney of this state has no lien of any kind upon the papers, moneys or judgment of his client. He must recover for his services and for moneys expended by him in the ordinary mode—i.e., by action.

The question was submitted in connection with the above inquiry as to whether the attorney would be entired to retain moneys in payment of disbursements made by him in the same matter as that in which the money was received.

The statements above are equally applicable to this situation.

It is desirable that an attorney act with absolute good faith with his client. If he wishes to retain moneys received by him to pay for disbursements made by him, he should obtain the consent of the client either before or after making such disbursements or receiving the moneys. If he does not obtain such consent, he should be restricted to his action to recover against the client therefor.

The Eleventh Canon of the American Bar Association provides:

> "Money of the client or other trust property coming into the possession of the lawyer should be reported promptly and except with the client's knowledge and consent should not be commingled with his private property or be used by him."

REPORT OF SECTION ON CIVIL PROCEDURE

To The Los Angeles Bar Association:—

Your Section on Civil Procedure, to which was referred the matter of reform and improvement of civil procedure in the courts of this state, respectfully reports as follows:

First: Your Committee reports that it is in favor of the regulation of procedure in the courts of California by rule of court, instead of code or statutory practice.

Second: Realizing that a change of practice from the Code of Civil Procedure to practice under rules adopted by the Supreme Court or by Judicial Counsel will probably be a matter of some years delay, your Committee recommends the following amendments to the Code of Civil Procedure, which the Committee believes will be of great benefit and which can undoubtedly be obtained at the next session of the legislature:

(1) An amendment doing away with the use of cross-complaint and permitting a counterclaim of all claims that can now be had under cross-complaint, and permitting a reply to counterclaim.

(2) A provision for serving absconding debtors or defendants who conceal themselves to evade service, by service of summons and complaint upon any person of suitable age at the residence of such defendant.

(3) A provision permitting the defendant to recover attorney's fees and damages against the sureties on bond in attachment in the suit in which the bond is given.

(4) A provision requiring service of notice of sale upon the trustor and owner of the fee in the same manner as is now required for a service of summons.

(5) A provision that in uncontested cases, depositions of witnesses to wills and testimony of applicants for letters of administration may be taken before the clerk of the court.

(6) That the following amendments and revisions should be made of the provisions of the Code of Civil Procedure regarding the law of evidence:

(a) Section 1875. Amendment by adding to subdivision 3, the following words: "also whatever are matters of common knowledge."

(b) Section 1875, subdivision 3. Insert after the words United States, "foreign countries."

(c) That section 2052 be amended to read as follows: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but b e f o r e this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, a witness may be cross-examined relative to the subject matter of the cause, without such writing being shown to him but if it is intended to impeach such witness by the writing, his attention must, before such impeaching evidence be given, be called to those parts of the writing which are to be used for the purpose of so impeaching."

Respectfully submitted,
GEORGE E. WALDO, Chairman
A. H. SWALLOW, Secretary

Dated: January 19, 1928.

Anonymous communications, addressed to Los Angeles Bar Association or to the Board of Trustees, will not be answered, either directly or through the pages of the BULLETIN.

Case Notes

WATER RIGHTS—SITUS—TAXATION

Spring Valley Water Co. vs. Planer, 55 Cal. App. Dec. 132. (Dec. 31, 1927.)

Three political subdivisions of the state of California — Alameda County Water District, Niles Sanitary District, and Dakota Fire District, respectively — are all within the boundaries of Alameda County. In behalf of said districts certain assessments on water rights of Spring Valley Water Company were made by the assessor of Alameda County.

These water rights which were subjected to taxation had been granted to the Spring Valley Water Company by all the owners of land within the districts named to which said water rights were appurtenant. The material portions of a very large number of said conveyances and agreements read as follows: "The grantor does grant unto Spring Valley Water Company all riparian rights in the water of said stream which are vested in the said grantor and as against the said grantor, his heirs, etc., and as against the lands; the right at the pleasure of said grantee, its successors, etc. to impound, appropriate, divert and take the waters of said Alameda Creek and of any and all tributaries and feeders thereof to the uses and purposes of the water works of said grantee, its successors, etc. and by means of a dam or dams erected across the said creek, or any of its tributaries, at any point or points at or above the inlet of Vallejo Hills Stone Chute (but not at any point below said inlet), and of such conduits as it shall erect to divert the waters out of said stream for the uses and purposes aforesaid." In a few instances the conveyances and agreements contained no express provision limiting the place at which the plaintiff might make its diversions from Alameda Creek.

The point mentioned in the conveyances and agreements as the inlet of Vallejo Mill Stone Chute is and at all times was outside any of the districts named as the districts for the benefit of which the taxes were assessed.

Query: May the Spring Valley Water Company recover the taxes paid?

Alameda County, in resisting the attempt of the Spring Valley Water Company to recover the taxes, argued that it was obvious that since all riparian owners within the designated districts had conveyed away to the Spring Valley Water Company for a valuable consideration all of their riparian rights and their rights to object to the taking of water, it was immaterial as to what point was used by Spring Valley Water Company as the place of diversion. It was argued further on behalf of the county that although the actual point of diversion was outside the boundaries of the districts, if the company had the *right* to divert the water within the districts it was a positive property right therein. Still a third contention of Alameda County was that the Spring Valley Water Company's right to divert water from the stream was based upon the rights acquired by the various conveyances above mentioned from every riparian owner on the creek within the districts, and that by means of these conveyances Spring Valley Water Company acquired a definite property right separate and distinct from the individual riparian rights of the owners, but which right was nevertheless situated for the purposes of taxation along the entire length of the creek, since it arose out of and was based upon the acquisition of the rights appurtenant to the riparian lands.

The court held that the situs of the right which Spring Valley Water Company had in this water was on the stream at the point of actual diversion and not within the territorial limits of any of the districts named and that therefore the taxes had been improperly collected in behalf of the said districts and should be returned to Spring Valley Water Company. Concerning the contention that a right of diversion in a stream extends throughout the entire length for the purposes of taxation the court said that it was not ready to adopt such a view because of the result which might follow

(Continued on Page 28)

Book Reviews

HARRY GRAHAM BALTER *of the Los Angeles Bar*

Lecturer in Law at the College of Law, Southwestern University

PREPARATION AND CONSTRUCTION OF WILLS; Clarence M. Lewis of the New York Bar; 1926; 1123 pages; Matthew Bender and Company, Albany, N. Y.

Clarence M. Lewis, the author of the unique and useful *Law of Leases*, and compiler of the forms which constitute Volume 5 of Williston on *Contracts*, has again made a valuable contribution to the equipment and tools of the lawyer and testamentary scrivener.

Mr. Dooley once said that he was much in favor of wills since many a man had no voice in his family until after his death. To the end that a voice thus raised might speak clearly, pointedly and intelligently, lawyers are well in need of such a volume as Mr. Lewis has published. It is not, nor does it pretend to be, a comprehensive treatise on the law of wills, but it is a desk book or handbook of annotated forms for lawyers and trust officers.

The book consists primarily of "Forms of the essential and usual clauses of wills and of many clauses designed to meet the requirements of unusual circumstances," appropriately annotated by means of abstracts of English and American cases construing the various types of clauses. An additional feature is the quotation of articles in legal periodicals, which articles are for the most part reprinted in full.

The forty-two model clauses are clear and concise and furnish examples of almost any clause which a lawyer might need in the preparation of wills.

Although several of the clauses are concerned with testamentary trusts the field is not exhausted. However, it is well that it should be so, since the subject would easily form a separate volume if treated in the same manner as the main subject of wills.

Of especial interest are the clauses dealing with the continuance of liquidation of the business interests of the testator. Good examples are Clause 3, Authority to Continue Investments; Clause 6, Power of Sale; Clause 21, Authority to Vote Stock; Clause 28, Authority to Continue Business; Clause 33, Declaration of Holding Property of Other Persons; Clause 39, Power to Enter Reorganizations.

The clause last mentioned is an example of a rarer type of clause which is of increasing importance in urban communities.

The work also contains an excellent bibliography of the law of wills. This bibliography which covers six pages is not limited to the usual list of treatise and text books, but also refers to various works on noted will cases. While the book is primarily concerned with the Anglo-American law of wills, the bibliography is much wider in scope and refers also, very briefly however, to France, Germany, Italy, Scotland and South Africa.

A collection of famous wills of prominent people is also appended. A table of cases and index, both of which appear to be well prepared, enhance the usefulness of this book.

ALBERT E. MARKS.

CASE NOTES

(Continued from Page 27)

that a water user in a stream rising in one county and flowing down through several other counties would be subject to taxation in every such county. However, the court does state in the instant case that in theory a water user may be said to have some sort of inchoate right in the entire stream.

For the purposes of taxation, therefore, water rights are to be regarded as having their situs at the place where diversion takes place even though the owners of land in other portions of the stream basin have by grant divested themselves of their "riparian" rights. Subsequent to the grant the rights which theretofore have been "riparian" cease to be such and become individual rights taxable at the point of diversion of water and not within the jurisdiction where the land to which the rights were originally appurtenant, has its situs.

REUEL L. OLSON.

THE STATE BAR

(Continued from Page 6)

profession, and of increasing its efficiency has rested almost exclusively upon the profession itself. The bar is the "strong arm of the courts." Yet the policy or propriety of laws fixing the requirements for admission to practice and for the discipline of the members of the legal profession have heretofore been questions to be ultimately settled, not by the members of the profession or the courts, but by the law-making body. Under the provisions of the State Bar Act, this responsibility is placed upon the profession. It has accepted the challenge, and will "carry on."

LEGISLATION RELATING TO LABOR LAWS

(Continued from Page 8)

civil action without first establishing any criminal liability.

EMPLOYERS TO PAY COST OF BONDS, ETC. —STATUTES 1917, PAGE 151; STATUTES 1927, CHAPTER 347. Under the new act employers are prohibited from demanding, exacting or accepting any cash bond from any employee, or applicant for employment, unless the employee, or applicant for employment, is entrusted with money, goods or other property of an equivalent value, or unless the employer advances regularly to his employees goods, wares or merchandise to be delivered or sold by said employee, for which goods, wares or merchandise the employer is reimbursed by the employee at regular periodic intervals, and limits said cash bond to an amount sufficient to cover the value of the goods, wares or merchandise so advanced during the period prior to the demand therefor, or unless that the cash received as a bond is deposited in a savings account in a bank authorized to do business in this state, to be drawn out only upon the joint signatures of the employer and the said employee or applicant for employment. The amendment also provides that any cash put up as a bond must be accompanied by an agreement in writing, setting forth the conditions under which said bond is given. The money thus put up as a bond is subject to garnishment by employer and employee only, and must be returned to the employee, together with interest, immediately upon the return of the money or property entrusted to the employee, or the fulfillment of the contract, subject only to such deductions as may be necessary to balance the account. The violation of this act is made a misdemeanor.

ADVERTISING DURING STRIKES — STATUTES 1913, PAGE 678; STATUTES 1927, CHAPTER 314. In advertising for help where strikes or other labor disturbances exist, the name of the advertiser must be inserted and the appearance of his name constitutes prima facie evidence of his responsibility. The violation of this act constitutes a misdemeanor.

Several other amendments have been passed at the last session of our legislature, which, however, are not considered of sufficient importance to be mentioned in this article.